UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 25

Docket No. NY-0752-10-0133-I-1

James W. Davison,

Appellant,

v.

Department of Veterans Affairs,

Agency.

February 18, 2011

James W. Davison, Guaynabo, Puerto Rico, pro se.

Joy C. Vilardi-Rizzuto, Esquire, San Juan, Puerto Rico, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, VACATE the initial decision IN PART, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed an appeal asserting that the agency had constructively suspended or failed to restore him to his position as physician after being in a leave without pay (LWOP) status. Initial Appeal File (IAF), Tab 1 at 2, 4, 6. The agency moved to dismiss the appeal, arguing, inter alia, that the Board lacked jurisdiction over it because the appellant is a physician appointed under 38 U.S.C. § 7401(1), and therefore lacked Board appeal rights under 5 U.S.C. chapter 75. IAF, Tab 4 at 5-6.

¶3 The administrative judge issued a jurisdictional order advising the appellant, among other things, that medical professionals appointed under 38 U.S.C. chapter 74 do not have the right to appeal actions under subchapter II of chapter 75 to the Board. IAF, Tab 6 at 1-2. Noting that the appellant bears the burden of proving jurisdiction, the administrative judge ordered him to submit evidence and argument explaining why the Board has jurisdiction over his appeal. *Id.* at 2. The administrative judge issued a separate jurisdictional order concerning the appellant's allegation that he was constructively suspended from his position, IAF, Tab 7, and another order on jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), inasmuch as the appellant had indicated that he believed that he was discriminated against due to his status as a veteran, IAF, Tab 12 at 10.

¶4 After the appellant submitted responses to the agency's motion to dismiss and the administrative judge's orders, the administrative judge dismissed the appeal for lack of jurisdiction based on the written record. IAF, Tab 18, Initial Decision (ID) at 2. The administrative judge found that, as an appointee under 38 U.S.C. § 7401(1), the appellant was not an "employee" with Board appeal rights under 5 U.S.C. chapter 75. ID at 6. She also found that the appellant failed to establish jurisdiction under USERRA in light of the appellant's submission on jurisdiction under that statute, in which he stated that he "admits he has no claim under USERRA." ID at 7; *see* IAF, Tab 16 at 5.

¶5 The appellant has filed a petition for review, and the agency has filed a response in opposition to it. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

¶6 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). A constructive suspension for more than 14 days constitutes an adverse action appealable to the Board. *See* 5 U.S.C. §§ 7512(2), 7513(d); *Peoples v. Department of the Navy*, 83 M.S.P.R. 216, ¶ 4 (1999). Only an "employee," as defined under 5 U.S.C. chapter 75, subchapter II, however, can appeal to the Board from an adverse action. *See* 5 U.S.C. §§ 7511(a)(1), 7513(d). This right of appeal does not accrue to an individual "who holds a position within the Veterans Health Administration (VHA) which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title." 5 U.S.C. § 7511(b)(10).

¶7 The record indicates that the appellant held a position in the VHA. That is, he was appointed under 38 U.S.C. § 7401(1), *see* IAF, Tab 4 at 7, and that section governs appointments in the VHA, *see* 38 U.S.C. §§ 7401-11. The appellant's position of physician is listed in section 7401(1) of title 38, and not in section 7401(3). Moreover, 38 U.S.C. § 7405(a) provides that the agency

> may employ, without regard to civil service or classification laws, rules, or regulations, personnel as follows:
>
> (1) On a temporary full-time basis, part-time basis, or without compensation basis, persons in the following positions:
>
> (A) Positions listed in section 7401(1) of [title 38].

Because the appellant held "a position within the [VHA] which has been excluded from the competitive service by or under a provision of title 38," the administrative judge correctly determined that section 7511(b)(10) of title 5 bars his constructive suspension appeal. ID at 6; *see Khan v. United States*, 201 F.3d

1375, 1380-81 (Fed. Cir. 2000); *Falso v. Office of Personnel Management*, 116 F.3d 459, 460 (Fed. Cir. 1997); *Mfotchou v. Department of Veterans Affairs*, 113 M.S.P.R. 317, ¶¶ 8-12 (2010); *Beckstrom-Parcell v. Department of Veterans Affairs*, 91 M.S.P.R. 656, ¶¶ 4-6 (2002); *Pichon v. Department of Veterans Affairs*, 67 M.S.P.R. 325, 327 (1995).

¶8 The appellant's contentions on review do not change this result. First, he contends that under the provisions of Executive Order 5396, *Special Leaves of Absence to be Given Disabled Veterans in Need of Medical Treatment*, he was not properly restored to duty after a period of LWOP. PFR File, Tab 1 at 6-9; *see* IAF, Tab 5 at 4, 8. Executive Order 5396 entitles disabled veterans in the executive branch to annual leave, sick leave, or LWOP to obtain necessary medical treatment, provided that the employee gives prior notice and provides appropriate medical documentation. Exec. Order No. 5396 (July 17, 1930). As the administrative judge correctly recognized, the appellant's reliance on Executive Order 5396 as a jurisdictional basis is misplaced because it is immaterial to the issue of whether section 7511(b)(10) of title 5 bars his constructive suspension appeal. ID at 7.

¶9 The appellant also argues that his status as a preference-eligible veteran and a "special disabled veteran" as defined by 38 U.S.C. § 4211(1) provides the Board with jurisdiction over his appeal. PFR File, Tab 1 at 7; *see* IAF, Tab 5 at 4-5. Although there is no dispute that the appellant is entitled to veterans' preference, *see* IAF, Tab 5 at 11, as the administrative judge correctly recognized, even as a "special disabled veteran," he has no chapter 75 appeal rights to the Board because he was appointed to his position under 38 U.S.C. 7401(1). ID at 6. Similarly, the appellant's claim that he is a "qualified covered veteran" under 38 U.S.C. § 4214 has no bearing on the jurisdictional issue. PFR File, Tab 1 at 9-10. Moreover, his apparent argument that the agency must demonstrate that its action promoted the efficiency of the service under 5 U.S.C. § 7513 misconstrues the jurisdictional analysis. PFR File, Tab 1 at 10-13. It is

the appellant who has the burden of proving by preponderant evidence that the Board has jurisdiction over his appeal. *See Hogan v. Department of the* Navy, 218 F.3d 1361, 1364 (Fed. Cir. 2000); *Covington v. Department of the Army,* 85 M.S.P.R. 612, ¶ 9 (2000); 5 C.F.R. § 1201.56(a)(2)(i). We find that the appellant's remaining arguments on petition for review concerning jurisdiction were raised below and constitute mere disagreement with the administrative judge's explained findings set forth in the initial decision. PFR File Tab 1 at 5-6. The appellant has not shown any legal error in this aspect of the initial decision, and his arguments concerning jurisdiction do not provide a basis for granting his petition for review. *See Weaver v. Department of the Navy,* 2 M.S.P.R. 129, 133-34 (1980), *review denied,* 669 F.2d 613 (9th Cir.1982) (per curiam); 5 C.F.R. § 1201.115. Thus, we find that the administrative judge correctly concluded that the appellant is not an "employee" entitled to appeal a constructive suspension, which is an adverse action under subchapter II of chapter 75, title 5, to the Board. The appellant's exclusive remedy is therefore before the agency, *see* 38 U.S.C. §§ 7461-64; *see also Khan,* 201 F.3d at 1381-82; *Mfotchou,* 113 M.S.P.R. 317, ¶ 11.

The appellant has made a nonfrivolous allegation of jurisdiction under USERRA.

¶10 Two types of cases arise under USERRA: (1) reemployment cases, in which the appellant claims that an agency has not met its obligations under 38 U.S.C. §§ 4312-4318 following the appellant's absence from civilian employment to perform uniformed service; and (2) so-called "discrimination" cases, in which the appellant claims that an agency has taken an action prohibited by 38 U.S.C. §§ 4311(a) or (b). *Clavin v. U.S. Postal Service,* 99 M.S.P.R. 619, ¶ 5 (2005). As stated above, the administrative judge issued an order on USERRA jurisdiction and notice of proof requirements which informed the appellant of the USERRA jurisdictional issues presented in his appeal and required him to file evidence and argument to prove that his appeal was within the Board's jurisdiction. *See* IAF, Tab 14. The administrative judge found that

the Board lacked jurisdiction over the appellant's USERRA claim based on the appellant's admission that he had no USERRA claim. ID at 7; *see* IAF, Tab 16 at 5. That admission, however, appears to be based solely on the appellant's belief that he had no reemployment claim under 38 U.S.C. § 4312. That is, the appellant stated in his jurisdictional submission that:

> [T]he sine qua non of a USERRA claim is an absence from the workplace *necessitated* by military or other qualifying service. 38 USC 4312(a) and (e). The appellant's absence was not necessitated by military service nor for a military medical examination, nor for treatment of a service connected condition, nor any other condition listed in 38 USC 4312(a) and (e).

IAF, Tab 16 at 4-5 (emphasis in original).

¶11 Neither the appellant nor the administrative judge, however, appears to have considered whether the appellant made a nonfrivolous allegation of jurisdiction under 38 U.S.C. § 4311, which governs USERRA discrimination claims. It is necessary to reopen the appeal on our own motion under 5 C.F.R. § 1201.118 to address this issue. To establish jurisdiction under 38 U.S.C. § 4311(a), an appellant must allege that: (1) he performed duty or has an obligation to perform duty in a uniformed service of the United States; (2) the agency denied him initial employment, reemployment, retention, promotion, or any benefit of employment; and (3) the denial was due to the performance of duty or obligation to perform duty in the uniformed service. *Hillman v. Tennessee Valley Authority*, 95 M.S.P.R. 162, ¶ 5 (2003).

¶12 Here, there is no dispute that the appellant has performed duty in a uniformed service of the United States. Further, the appellant alleges that the agency took actions to "delay [his return to duty from LWOP] as long as possible," and that "[t]his retaliatory attitude stemmed from the fact that [the agency's] granting me LWOP was only up to September 29, 2008. After that date I took LWOP as a matter of right under provisions of Executive Order 5396." IAF, Tab 12 at 4-5 (footnotes omitted); *see also id.* at 6 ("My return to work was

further complicated by the fact [of] retaliation for my having exercised my right to LWOP under Executive Order 5396 . . . ."). Restoration to duty falls within USERRA's broad definition of a "reemployment, retention . . . or any benefit of employment."[*]

¶13 Under 38 U.S.C. § 4311, military service is a motivating factor for an employment action if the employer "relied on, took into account, considered, or conditioned its decision" on the employee's military–related absence or obligation. *Erickson v. U.S. Postal Service,* 571 F.3d 1364, 1368 (Fed. Cir. 2009). The Board has held that an allegation that an employer took or failed to take certain actions based on an individual's military status or obligations in violation of USERRA constitutes a nonfrivolous allegation entitling the appellant to Board consideration of his claim. *Tindall v. Department of the Army,* 84 M.S.P.R. 230, ¶ 9 (1999); *Melvin v. U.S. Postal Service*, 79 M.S.P.R. 372, 377 (1998). Here, the appellant's performance of duty in the uniformed service was a necessary precondition of his entitlement to LWOP under Executive Order 5396. Accordingly, by contending that the agency retaliated against him for taking LWOP under that Executive Order, the appellant has arguably alleged that the agency took into account a military-related absence in failing to promptly restore him to duty.

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[*] USERRA provides, in relevant part, as follows:

> The term "benefit," "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4303(2).

¶14 The appellant's allegation of agency retaliation for the exercise of his right as a disabled veteran to LWOP under Executive Order 5396 distinguishes this case from *Bagunas v. U.S. Postal Service*, 92 M.S.P.R. 5, ¶ 17 (2002), *overruled on other grounds by*, *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371, 375-77 (2009), and its progeny, in which the Board held that a claim of discrimination based on a disability alone -- even a disability arising out of military service -- is not cognizable under USERRA, *see also Daniels v. U.S. Postal Service*, 88 M.S.P.R. 630, ¶ 8 (2001) *aff'd*, 25 F. App'x 970 (Fed. Cir. 2001); *McBride v. U.S. Postal Service*, 78 M.S.P.R. 411, 414-15 (1998). In such cases, "the appellant [does not] claim that the fact that he . . . performed in a uniformed service . . . accounted for the agency's action;" rather he "claim[s] instead that it was as a result of something that happened during [his] service that accounts for the treatment [he] received from the agency." *Daniels*, 88 M.S.P.R. 630, ¶ 8. Here, the appellant alleges, not that his service-related disability accounted for the agency's action, but that its action was in reprisal for having exercised a right to LWOP granted only to those who have performed in a uniformed service. Indeed, as stated above, the appellant has indicated that, although he is a disabled veteran, the medical treatment that he received while on LWOP status was not "for treatment of a service connected condition," IAF, Tab 16 at 5, and he argues on review that although "[t]he Veteran needs to have a service connected condition to benefit from Executive Order 5396, . . . the medical treatment can be for any condition, service connected or not," PFR File, Tab 1 at 7.

¶15 Based on the foregoing, we find that the appellant has made a nonfrivolous allegation of jurisdiction under 38 U.S.C. § 4311. In so finding, we express no opinion on the merits of the appellant's USERRA claim, his interpretation of Executive Order 5396, or whether he was entitled to LWOP under that Executive Order. The strength or weakness of the assertions in support of a claim is not a basis to dismiss the USERRA claim for lack of jurisdiction; rather, if the

appellant fails to develop his contentions, his USERRA claim should be denied on the merits. *Tindall*, 84 M.S.P.R. 230, ¶ 9; *Melvin*, 79 M.S.P.R. at 377. We therefore find it necessary to remand this appeal for adjudication of the appellant's USERRA claim.

ORDER

¶16 The initial decision is AFFIRMED IN PART and VACATED IN PART. The appeal is REMANDED to the Field Office for further adjudication of the appellant's USERRA claim consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.